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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 651

B. R. SHEFFIELD, *Petitioner*

v.

ERNEST BROOKS, Sheriff of Hill County, Texas, *et al., Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 10 |
| 1. The Affirmance of Petitioner's Conviction on the Basis of a Charge for Which He Was Never Tried and Twice Acquitted | 10 |
| 2. Petitioner's Unfair Exposure to Double Jeopardy | 13 |
| 3. The Erroneous Interpretation By the Fifth Circuit Court of Appeals of the Opinions of the Texas Court of Criminal Appeals | 15 |
| 4. Petitioner's Right to Hearing on Application for Probation | 18 |
| Conclusion | 21 |
| Appendix A | 1a |
| Appendix B | 20a |


## TABLE OF AUTHORITIES

CASES:


| | |
|---|---|
| Bartkus v. Illinois, 359 U.S. 129 (1959) | 14 |
| Betts v. State, 60 Tex. Crim. 631, 133 S.W. 251 (1911) | 13 |
| Black v. State, 143 Tex. Crim. 318, 158 S.W. 2d 795 (1942) | 13 |
| Blackburn v. Alabama, 354 U.S. 393 (1957) | 18 |
| Brown v. Bailey, 215 S.C. 175, 54 S.E.2d 769 (1949) | 17 |

Page

Chessman v. Teets, 354 U.S. 156 (1957) ..... 21
Ciucci v. Illinois, 356 U.S. 571 (1958) ..... 14
Cole v. Arkansas, 333 U.S. 196 (1948) .....10, 11, 13
Commonwealth v. Analetto, 326 Mass. 115, 93 N.E. 2d 390 (1950) ..... 17
De Jonge v. Oregon, 299 U.S. 353 (1937) ..... 11
Douglas v. California, 372 U.S. 353 (1963) .....15, 21
Downum v. United States, 372 U.S. 734 (1963) ..... 14
Fay v. Noia, 372 U.S. 391 (1963) ..... 19
Garner v. Louisiana, 368 U.S. 157 (1961) ..... 11
Gideon v. Wainwright, 372 U.S. 335 (1963) ..... 15
Green v. United States, 355 U.S. 184 (1957) ..... 14
Green v. United States, 365 U.S. 301 (1961) ..... 20
Hays v. State, 43 So. 2d 206 (Miss. 1949) ..... 17
Hoag v. New Jersey, 356 U.S. 464 (1958) ..... 14
Kovacs v. Brewer, 356 U.S. 604 (1958) ..... 18
Mapp v. Ohio, 367 U.S. 643 (1961) ..... 15
Minnesota v. National Tea Co., 309 U.S. 551 (1940) .. 17
Morissette v. United States, 342 U.S. 246 (1952) ..... 17
Owen v. People, 118 Colo. 415, 195 P. 2d 953 (1948) .. 17
Palko v. Connecticut, 302 U.S. 319 (1937) ..... 14
Parish v. State, 145 Tex. Crim. 117, 165 S.W. 2d 748 (1942) ..... 13
Petite v. United States, 361 U.S. 529 (1960) ..... 14
Powell v. Alabama, 287 U.S. 45 (1932) ..... 19
San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957) ..... 18
Sealfon v. United States, 332 U.S. 575 (1948) ..... 14
Sheffield v. Texas, 165 Tex. Crim. 354, 307 S.W. 2d 100 (1957) ..... 8
Smith v. Commonwealth, 282 S.W. 2d 618 (Ky. 1955) .. 17
State v. Klein, 154 Tex. Crim. 31, 224 S.W. 2d 250 (1949) ..... 19
State Tax Comm'n v. Murray Co., 364 U.S. 289 (1960) 18
Thompson v. Louisville, 362 U.S. 199 (1960) ..... 11
Townsend v. Burke, 304 U.S. 736 (1948) ..... 19
United States v. Behrens, 375 U.S. 162 (1963) .....19, 20
United States v. Oppenheimer, 242 U.S. 85 (1916) .... 14
Van Hook v. United States, 365 U.S. 609 (1961) ..... 20
Williams v. New York, 337 U.S. 241 (1949) ..... 20
Williams v. Oklahoma, 358 U.S. 576 (1959) ..... 20
Yates v. United States, 354 U.S. 298 (1957) ..... 14

Page

CONSTITUTIONS:

United States Constitution, Fifth Amendment ..... 14
United States Constitution, Fourteenth Amendment 2, 3, 8, 9, 10, 13, 14, 18, 19, 20, 21
Texas Constitution, Article I, Section 14 .....3, 13

STATUTES:

18 U.S.C. § 3651 ..... 19
28 U.S.C. § 1254(1) ..... 2
28 U.S.C. § 2254(1) ..... 3
Texas Code of Criminal Procedure, Article 781d .... 3, 9
Texas Penal Code, Chapter 2, Title 14 .....3, 4, 16
Article 1007 .....5, 6, 7, 10, 15, 16
Article 1008 ..... 4
Article 1010 ..... 16

MISCELLANEOUS:

Supreme Court Rules, Rule 19(a) ..... 19
Federal Rules of Criminal Procedure, Rule 32(a) .... 19

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioner, B. R. Sheffield, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above-entitled case denying petitioner's application for a writ of habeas corpus, and the denial of petitioner's petition for rehearing dated October 6, 1964.

### OPINIONS BELOW

The opinion of the court below is not yet reported and is printed herein in Appendix A. The original opinion of the court of August 31, 1964, affirming the order of the District Court for the Western District of Texas which denied a writ of habeas corpus is printed in Appendix A, at pp. 1a-5a, *infra;* the court's opinion of October 6, 1964, denying petitioner's petition for rehearing is printed at p. 7a, *infra.* The District Court issued no opinion, but made findings of fact and con-

clusions of law, which are printed in Appendix A, at pp. 8a-9a, *infra*.

Petitioner was convicted in the District Court of Hill County, Texas, of knowingly uttering a forged instrument. The opinions of the Texas Court of Criminal Appeals affirming the conviction and denying petitioner's first and second motions for rehearing are printed in Appendix A, at pp. 9a-20a, *infra*. Also noted is the opinion of the Court of Criminal Appeals of April 24. 1957, reversing petitioner's conviction under a prior indictment based on the same transactions, reported at 165 Tex. Crim. 354, 307 S. W. 2d 100 (1957). (R. I, 335-42.)

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 31, 1964. Petitioner's petition for rehearing was denied on October 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals denied petitioner due process under the Fourteenth Amendment of the United States Constitution by sustaining petitioner's conviction on the basis of a finding that petitioner had committed an offense for which he was never tried below, and which, in fact, had been abandoned by the State in two separate trials.

2. Whether such a finding by the Court of Criminal Appeals violated the Due Process Clause of the Fourteenth Amendment by unfairly exposing petitioner to double jeopardy for an offense for which he had been acquitted twice.

3. Whether the Fifth Circuit Court of Appeals erroneously interpreted the decision of the Texas Court of Criminal Appeals.

4. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a state court in a criminal proceeding can deny a defendant an opportunity to present evidence in support of an application for probation and suspension of a sentence of confinement imposed by a jury.

## STATUTES INVOLVED

The statutes involved are Articles 1006-1011, comprising Chapter 2 of Title 14 of the Texas Penal Code, which covers offenses involving forged instruments affecting land documents; Section 3 of the Texas Adult Probation and Parole Law of 1957, Article 781d of the Texas Code of Criminal Procedure; Article I, Section 14 of the Texas Constitution prohibiting double jeopardy; and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The pertinent provisions of the Texas statutes involved herein are set out in Appendix B.

## STATEMENT OF THE CASE

This is a habeas corpus proceeding under 28 U.S.C. § 2254(1).[1] The United States District Court for the Western District of Texas found that petitioner had

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[1] The record filed with the Supreme Court is in three parts and is referred to herein as follows:

"R.I—" refers to that portion of the record containing the pertinent motions, opinions and other papers filed in the various proceedings below.

"R.II—" refers to the copies of the briefs filed on appeal in the Court of Appeals for the Fifth Circuit.

"R.III—" refers to the 9-volume transcript of evidence presented at petitioner's trial below.

exhausted his state court remedies and that his application for habeas corpus presented no substantial federal question. The Court denied a certificate of probable cause. (Appendix A, pp. 8a-9a, *infra.*) Petitioner's application for habeas corpus presented the same questions heretofore presented to this Court in *Sheffield* v. *Texas,* 375 U.S. 833 (1963), petition for certiorari to the Court of Criminal Appeals of Texas, denied by the Court on October 14, 1963, Justice Douglas being "of the opinion that certiorari should be granted" (R. I, 357).

Chief Circuit Judge John R. Brown issued a certificate of probable cause and fixed bail pending appeal (R. I, 39). The Court of Appeals for the Fifth Circuit affirmed the District Court's decision. The Court also denied a petition for rehearing, but allowed bail pending the final order of this Court.

In the state trial court, petitioner was indicted on two counts under Chapter 2 of Title 14 of the Texas Penal Code. The first count charged that petitioner, with intent to defraud, committed forgery by aiding, encouraging and procuring the forgery of an acknowledgment of an instrument relating to land by a notary public, Doris Sayles (R. I, 118-25). The second count charged that petitioner, with intent to defraud, knowingly passed this forged acknowledgment to the Texas Veterans' Land Board (R. I, 125-32). Petitioner pleaded not guilty to both counts. As hereinafter noted, the first count was not submitted to the jury; however, petitioner was convicted below under the second count of passing a forged instrument in violation of Article 1008 of the Code. The jury imposed on petitioner a sentence of 6 years in the state penitentiary.

The alleged forged acknowledgment which petitioner was convicted of passing was a part of an application personally signed by a Texas Korean War veteran, A. G. Mireles, to the Texas Veterans' Land Board for about $7,000 to purchase 200 acres of farm land allegedly owned by petitioner and his associates. Pursuant to the procedure provided under the Texas Veterans' Land Law, the Board purchased the land and in turn transferred it to the veteran under a long-term loan.

The acknowledgment in issue stated that the applicant Mireles had personally appeared before the notary public, Doris Sayles, and acknowledged the signing of the application. The State charged that the acknowledgment was a forgery on the following grounds:

(i) It was false because, as the Texas Court of Criminal Appeals found, although Mireles actually signed the application, he did not personally appear before Mrs. Sayles (Appendix A, p. 11a, *infra*). It was similarly found that she had also signed and certified the acknowledgment at a later time but outside of Mireles' presence (*ibid.*).

(ii) The false acknowledgment, the State charged, constituted a forgery by reason of Article 1007 of the Texas Penal Code. This section provides that any person, authorized to take proof of acknowledgment, who "wilfully and falsely" certifies that an acknowledgment relating to title of land was duly made is guilty of forgery. It is important to note that the trial court specifically instructed the jury that to convict petitioner of passing a forged instrument, it was required to find that the notary public, Mrs. Sayles, had committed the forgery of this acknowledgment. See p. 12, *infra*.

At petitioner's trial, the State prosecution sought to show that the applicant Mireles in fact did not wish to purchase the land in question, but had signed the application upon payment of $100 by an alleged accomplice of the petitioner. The State also sought to show that Mireles' application, together with applications of other veterans procured by the same means and covering other parcels of farm land allegedly owned by petitioner and his associates, was submitted by accomplices of petitioner to the Texas Veterans' Land Board and that the Board paid petitioner and his associates inflated prices for the land. Petitioner, a contractor who had no prior criminal record, took the stand and denied the State's charges.

Petitioner bases this petition on the following events occurring during the course of the proceedings below:

*First:* The Court of Criminal Appeals of Texas, in reviewing petitioner's conviction, upheld the judgment of the trial court on a finding that petitioner, rather than Mrs. Sayles, committed the forgery of the acknowledgment in question. However, this charge had never been submitted to the jury below, and petitioner in fact had been twice acquitted of this offense inasmuch as the charge had been abandoned in two proceedings against petitioner, including the trial below.

Specifically, on the appeal, petitioner contended that there was no forgery of the acknowledgment within the meaning of Article 1007. The record showed that there had been no forgery of the signatures on the application or on the acknowledgment, and that the notary public, Doris Sayles, in making the acknowledgment lacked the requisite intent to defraud as prescribed to establish a forgery under Article 1007; indeed, the

record showed that she had no knowledge of the alleged illegal scheme of petitioner involving the Texas Veterans' Land Board. The Court of Criminal Appeals, in its original opinion, however, rejected this contention on the ground that no intent to defraud was required to establish the commission of forgery under Article 1007.

Petitioner, in his first motion for rehearing, then cited the Texas authorities demonstrating that a fraudulent intent was an essential element of the offense under Article 1007. The Court of Criminal Appeals issued a second opinion overruling petitioner's motion. In answer to petitioner's citation of authorities, the court set forth a wholly new basis to support its conclusion that the acknowledgment had been forged as charged. Specifically, it found that, without regard to Doris Sayles' intent in making the false acknowledgment, the evidence was sufficient to establish that petitioner possessed a fraudulent intent and that he was a principal in the commission of the alleged forgery offense. As the court found (Appendix A, p. 18a, *infra*):

> "It is strenuously re-urged that the evidence is insufficient to support the conviction on the ground that there is no showing that Doris Sayles, the notary, had any fraudulent intent when she certified that Mireles had appeared before her in the making of the acknowledgment.
>
> "In addition to the disposition made of this contention in the original opinion, it is further concluded that without regard to whether Doris Sayles innocently, or while acting as a principal, certified that Mireles appeared before her as a notary, the evidence is sufficient to warrant the finding that the appellant had the intent to de-

> fraud and was a principal in the commission of the offense charged."

At the first opportunity, in his second motion for rehearing, petitioner raised the issue of the serious deprivation of due process under the Fourteenth Amendment committed by the Court of Criminal Appeals in sustaining petitioner's conviction on the basis of a finding that petitioner had perpetrated a forgery. As petitioner noted below, such a finding (a) deprived petitioner of a fair trial and of his right to trial by jury, and (b) also unfairly exposed him to double jeopardy. This was true because petitioner had not been tried below for the forgery offense and had been previously acquitted of the charge under controlling Texas law.

In fact, the trial court had refrained from submitting the first count of the indictment to the jury; this charged petitioner with committing the very offense found by the Court of Criminal Appeals. Moreover, in petitioner's prior trial, the State had expressly elected to abandon a virtually identical count involving the same offense. (See R. I, 318.)[1] Under Texas law, such abandonment of a charge constitutes an acquittal. Consequently, petitioner stood twice acquitted of forgery. Nonetheless, the Court of Criminal Appeals sustained his conviction by holding him guilty of the same charge.

*Second:* Petitioner was refused an opportunity by the trial court to present evidence on his application

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[1] At this trial, petitioner was convicted of passing a forged instrument. However, this conviction was reversed by the Court of Appeals because of an evidentiary deficiency and other errors not pertinent here . See *Sheffield* v. *Texas*, 165 Tex. Crim. 354, 307 S.W.2d 100 (1957).

for probation. After the jury imposed its sentence of confinement on petitioner, he filed an application with the trial court for probation and suspension of the sentence pursuant to Article 781d of the Texas Code of Criminal Procedure. This provision permits the court to grant such an application when "the ends of justice and the best interests of the public and defendant will be subserved thereby. . . ." In furtherance of this application, petitioner proffered evidence which showed, among other things, that he was in poor health, and that the State would recover in full all of its funds allegedly paid over to petitioner, plus an additional profit of $30,000 by reason of the increased value of the land in issue. (See R. I, 237-41.)

The trial court, however, refused to afford petitioner a hearing. The court ruled that in view of petitioner's conviction, it had no "patience" with the application and rejected it summarily (R. I, 251). It accordingly rejected petitioner's application without considering petitioner's proffered evidence. In fact, in the bill of exceptions filed with the Court of Criminal Appeals, the trial court took note that it "specifically does not certify that any of the proffered facts . . . are in fact true, but that they are [petitioner's] allegations" (R. I, 255).

Petitioner duly excepted to the trial court's ruling. On appeal to the Court of Criminal Appeals, he specifically raised the issue that this refusal contravened petitioner's rights under the Due Process Clause of the Fourteenth Amendment. The Court of Criminal Appeals, however, sustained the trial court's decision on the ground that the grant of probation was discretionary with that court. (See Appendix A, p. 16a, *infra*.)

As noted, these matters were presented to this Court in connection with petitioner's previous petition for certiorari, *Sheffield* v. *Texas, supra;* they were further raised in the proceedings below on petitioner's application for a writ of habeas corpus in the District Court for the Western District of Texas, and following that Court's denial of petitioner's application, in the Court of Appeals for the Fifth Circuit. With respect to petitioner's first contention regarding the disposition by the Texas Court of Criminal Appeals, the Fifth Circuit Court of Appeals rejected petitioner's claim on the ground that the Texas Court of Criminal Appeals had ruled that an intent to defraud was not an element of crime defined under Article 1007, although the Court of Appeals expressly acknowledged that the Texas Court's opinion was "not altogether free of difficulty." The Court of Appeals similarly rejected petitioner's second contention regarding his right to a hearing on probation, on the ground that this was a discretionary matter with the state court.

## REASONS FOR GRANTING THE WRIT

### 1. The Affirmance of Petitioner's Conviction on the Basis of a Charge for Which He Was Never Tried and Twice Acquitted

In *Cole* v. *Arkansas,* 333 U.S. 196, 200 (1948), this Court upheld the contention virtually identical to the point advanced below by petitioner herein, that "to sustain a conviction on grounds . . . which the jury had no opportunity to pass upon deprives the defendants of a fair trial and a trial by jury, and denies the defendants the due process guaranteed by the Fourteenth Amendment to the United States Constitution." As the Court specifically ruled in *Cole* v. *Arkansas* (333 U.S. at 201):

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

This court has repeatedly applied this fundamental principle in condemning efforts by state appellate courts to overcome serious evidentiary deficiencies and other errors in trial court proceedings by upholding convictions on the basis of charges not in fact tried below. *E.g., Cole* v. *Arkansas, supra; Garner* v. *Louisiana,* 368 U.S. 157, 164 (1961); *Thompson* v. *Louisville,* 362 U.S. 199, 206 (1960); *De Jonge* v. *Oregon,* 299 U.S. 353 (1937). As the Court held in *De Jonge* v. *Oregon, supra,* 299 U.S. at 362: "Conviction upon a charge not made would be sheer denial of due process."

In this case, in an effort to uphold petitioner's conviction despite a serious deficiency in an essential element of proof, the Texas Court of Criminal Appeals similarly deviated from the standards of due process established by the cited decisions. Thus, under the indictment, the State was required to prove that the acknowledgment which petitioner allegedly passed to the Texas Veterans' Land Board was actually forged. However, as already noted, it was established that there was no forgery of any signature on the application or on the accompanying acknowledgment. Moreover, the testimony of the notary public, Doris Sayles, who appeared as a State witness, plainly revealed that she had no intent to defraud in making the acknowledgment outside of the applicant's presence. (See R. III, 593-651.)

To sustain the conviction, despite this lack of evidence, the Court of Criminal Appeals was impelled to

find that petitioner was guilty of the charge, never tried below, that he was a principal in the forgery. Under the decisions of this Court cited above, this was clearly a "sheer denial of due process."

There is no doubt that the affirmance by the Court of Criminal Appeals was based on an untried charge. The instructions show that the only forgery issue submitted to the jury was whether Doris Sayles—not petitioner—had forged the instrument. The trial court's instruction on the forgery issue was this:

> "You are instructed that *before you can convict the defendant of knowingly passing a forged instrument in this cause,* you must find and believe beyond a reasonable doubt that the *acknowledgment of Alfonso M. Mireles* to the application and contract of sale submitted to the Veterans' Land Board *was in fact willfully forged by Doris Sayles,* meaning by the term 'willfully' that such action was taken with evil intent or legal malice, or without reasonable grounds to believe the act to be lawful, and you must further find and believe, beyond a reasonable doubt that defendant passed the acknowledgment of Alfonso G. Mireles to the Veterans' Land Board . . . ." (Emphasis supplied.) R. I, 160.

The trial court refrained altogether from submitting to the jury the first count of the indictment which alleged that petitioner was a principal in the commission of the forgery by Doris Sayles, the very charge on which he now stands convicted, not by a jury, but by the Texas Court of Criminal Appeals. Moreover, as also noted, in petitioner's first trial, the State had expressly abandoned the count and elected not to submit it to the jury. (See R. I, 318.) As we next show, petitioner accordingly stood twice acquitted of the

offense of forgery. There was clearly no justifiable ground, under any concept of due process, supporting the Court of Criminal Appeals' decision to sustain petitioner's conviction on this basis. As this Court also held in *Cole* v. *Arkansas, supra* (333 U.S. at 201):

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

It follows that petitioner's conviction plainly constitutes a serious and intolerable deviation from established principles of due process of law within the meaning of the Fourteenth Amendment.

**2. Petitioner's Unfair Exposure to Double Jeopardy**

Petitioner further submits that the affirmance of petitioner's conviction on the basis of the forgery charge violated the double jeopardy prohibitions embodied in the Due Process Clause of the Fourteenth Amendment. It is beyond question that under Texas law petitioner stood *twice acquitted* of the offense of forgery. *Black* v. *State,* 143 Tex. Crim. 318, 158 S.W. 2d 795 (1942); *Parish* v. *State,* 145 Tex. Crim. 117, 165 S.W. 2d 748 (1942); *Betts* v. *State,* 60 Tex. Crim. 631, 133 S.W. 251 (1911). Having been so acquitted, petitioner could not be tried again for the offense of forgery under Texas law. See Texas Constitution, Article I, Section 14.

We submit that this case presents an appropriate and timely opportunity for the Court to consider the proper scope of protection afforded by the Due Process Clause of the Fourteenth Amendment against a state's

contravention of the principles of double jeopardy. In *Palko* v. *Connecticut,* 302 U.S. 319, 328 (1937), this Court held that the Fourteenth Amendment did not embody the double jeopardy provisions of the Fifth Amendment. In contrast, however, for purposes of federal criminal proceedings, the Court has stringently enforced the double jeopardy restraints under the Fifth Amendment. See, *e.g., Green* v. *United States,* 355 U.S. 184 (1957); *Downum* v. *United States,* 372 U.S. 734 (1963); cf. *Petite* v. *United States,* 361 U.S. 529 (1960). This has included the absolute prohibition of a subsequent prosecution of a defendant based on any matters encompassed by a prior acquittal of the defendant, even where the subsequent prosecution involves a different offense. See, *e.g., Sealfon* v. *United States,* 332 U.S. 575 (1948); cf. *Yates* v. *United States,* 354 U.S. 298, 336 (1957); *United States* v. *Oppenheimer,* 242 U.S. 85 (1916). The standards of these cases would clearly condemn the ruling of the Court of Criminal Appeals in this case that petitioner was guilty of the offense of forgery.

The rule of the *Palko* case, that the Fourteenth Amendment affords a limited protection against the imposition of double jeopardy by the states, has been upheld in this Court by increasingly narrow majorities. See *Hoag* v. *New Jersey,* 356 U.S. 464 (1958) (5-3 decision); *Ciucci* v. *Illinois,* 356 U.S. 571 (1958) (5-4 decision); cf. *Bartkus* v. *Illinois,* 359 U.S. 129 (1959) (5-4 decision). As Justice Douglas stated in his dissent, concurred in by Justice Black, in *Hoag* v. *New Jersey,* 356 U.S. 464, 477 (1958):

> "We recently stated in Green v. United States, 355 U.S. 184, that by virtue of the constitutional protection against double jeopardy an accused can

be forced to 'run the gantlet' but once on a charge. That case, involving a federal prosecution, provides for me the standard for every state prosecution as well, and by that standard this judgment of conviction should be reversed."

With increasing frequency, this Court has found that in many areas of criminal procedure, the constitutional requirements applicable to federal and state proceedings involve the same considerations of fundamental justice and require the application of the same standards. See, *e.g., Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Mapp* v. *Ohio,* 367 U.S. 643 (1960); cf. *Douglas* v. *California,* 372 U.S. 353, 355-58 (1963). It is no less essential that the court re-evaluate the differences in the constitutional treatment of double jeopardy principles in federal and state proceedings, and adopt more uniform standards. This case presents an appropriate opportunity for such a re-evaluation and should accordingly be reviewed by this Court.

**3. The Erroneous Interpretation By the Fifth Circuit Court of Appeals of the Opinions of the Texas Court of Criminal Appeals**

In an effort to avoid the serious constitutional questions raised by petitioner on this score, the court below, sidestepped petitioner's contentions by ruling that the Texas Court of Criminal Appeals had ruled that an intent to defraud was not an element to establish a forgery under Article 1007 in its original opinion. Specifically, according to the Fifth Circuit Court of Appeals, this ruling still stands because the Texas Court of Criminal Appeals had not withdrawn it in issuing its second opinion on the petitioner's motion for rehearing, in which, as noted, the Texas Court sought to sustain the conviction on the basis that peti-

tioner had committed the forgery. We submit that the Court of Appeals was in error.

In the first place, as the Court of Appeals admitted, the opinion of the Texas Court of Criminal Appeals is "not altogether free of difficulty." The undisputed fact is that while the Texas Court declined to withdraw its initial opinion on this point, it felt constrained to issue another opinion holding that petitioner was guilty of the untried forgery charge. The inference is accordingly warranted that the Court recognized the infirmity of its original opinion and required a different ground for affirming petitioner's conviction—namely, the determination that he had committed the offense of forgery which had never been tried; otherwise the issuance of an opinion with this determination was superfluous. Petitioner was thus deprived of due process by reason of the appellate court's action in convicting him of a criminal charge which he had no opportunity to contest.

Moreover, the Texas Court's second opinion was rendered in response to petitioner's Motion for Rehearing, containing citations of Texas authorities which overwhelmingly establish that a fraudulent intent is necessary to establish a forgery under Texas law, and to make a forged acknowledgment in violation of Article 1007 of the Texas Penal Code.[1] There is no question that a fraudulent intent has long been established as an essential element of the crime of

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[1] For example, Article 1010, in dealing with the requirements of proof under Chapter 2 of Title 14 of the Texas Penal Code, which includes Article 1007, refers repeatedly to the necessity for establishing a "fraudulent intention" and an "intent to defraud" under all of the articles in Chapter 2, without qualification. See Appendix B, p. 22a, *infra*.

forgery and that this has been uniformly recognized by the courts of many other jurisdictions as well as Texas. See, *e.g.*, *Owen* v. *People*, 118 Colo. 415, 195 P. 2d 953 (1948) (en banc); *Smith* v. *Commonwealth*, 282 S.W. 2d 618 (Ky. 1955); *Commonwealth* v. *Analetto*, 326 Mass. 115, 93 N.E. 2d 390 (1950); *Hays* v. *State*, 43 So. 2d 206 (Miss. 1949) (en banc); *Brown* v. *Bailey*, 215 S.C. 175, 54 S.E. 2d 769 (1949). Indeed, if the Texas Court of Criminal Appeals had issued a final ruling that a fraudulent intent was not necessary to establish a forgery, it would constitute a wide departure from accepted principles and would itself raise serious Due Process questions. Cf. *Morissette* v. *United States*, 342 U.S. 246 (1952). Clearly, in the face of these circumstances, the Court of Appeals committed error in presuming that the Texas Court of Criminal Appeals intended to establish a new and novel rule for proving forgery.

In any event, while petitioner believes it is clear that the Texas Court of Criminal Appeals plainly sustained his conviction on charges not tried below and for which he stood acquitted, petitioner should not be denied protection of the Federal Constitution on the basis of an opinion which is conceded to be "not altogether free of difficulty."

This Court has emphasized that it is important "that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940). The Court continued:

> "Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.

> Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions."

*Ibid.* These principles have been frequently reaffirmed. See, *e.g., State Tax Comm'n* v. *Murray Co.,* 364 U.S. 289 (1960) (per curiam); *Kovacs* v. *Brewer,* 356 U.S. 604 (1958); *Blackburn* v. *Alabama,* 354 U.S. 393 (1957) (per curiam); *San Diego Building Trades Council* v. *Garmon,* 353 U.S. 26 (1957).

No criminal conviction should be sustained if the basis for it is unclear. At the very least, this Court should remand the case for clarification by the Texas Court of Criminal Appeals.

**4. Petitioner's Right to Hearing on Application for Probation**

The final question relates to the refusal of the trial court to grant petitioner an opportunity to present evidence in support of his application for probation and suspension of the sentence imposed under Texas procedure by the jury.

So far as we know, this Court has never decided the issue whether the Due Process Clause of the Four-

teenth Amendment entitles a defendant to such a hearing. We submit, however, that the refusal of the State to recognize this right is not in accordance with the basic concepts of fair procedure recognized by this Court as guaranteed under the Fourteenth Amendment, and that review is accordingly warranted. See Rule 19(a), Supreme Court Rules. The Court has frequently noted that "the scope of due process [under the Fourteenth Amendment] . . . comprehends . . . the right to be heard." See, *e.g.*, *Fay* v. *Noia*, 372 U.S. 391, 427 (1963). As the Court noted in *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932):

> "an opportunity of being heard is . . . among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' "

And this "right to be heard" plainly applies to the sentencing stage of a criminal proceeding, which involves a critical issue of a defendant's liberty or confinement. Cf. *Townsend* v. *Burke*, 304 U.S. 736 (1948).

The Texas Probation Law has been interpreted to be in all essential respects the same as the Federal Probation Statute, 18 U.S.C. § 3651. See *State* v. *Klein*, 154 Tex. Crim. 31, 224 S.W. 2d 250 (1949). Under federal procedure, the defendant is specifically provided under Rule 32(a) of the Federal Rules of Criminal Procedure, with "an opportunity to make a statement on his own behalf *and to present any information in mitigation of punishment.*" (Emphasis supplied.) The Court has regarded the opportunity afforded under Rule 32(a) to be of such importance that it has reversed a conviction and required resentencing where the defendant has been denied an opportunity to make a statement before sentencing. See *United States* v.

*Behrens,* 375 U.S. 162 (1963); *Van Hook* v. *United States,* 365 U.S. 609 (1961); cf. *Green* v. *United States,* 365 U.S. 301 (1961). The federal practice is, we submit, a reflection of rudimentary safeguards which should be held applicable under the Fourteenth Amendment to state proceedings, safeguards which plainly require that petitioner be permitted an opportunity to present evidence on behalf of an application for probation.

The Court has held that the state courts are afforded a wide discretion in the sources and types of information which they may rely upon in sentencing an accused. See *Williams* v. *New York,* 337 U.S. 241 (1949); *Williams* v. *Oklahoma,* 358 U.S. 576 (1959). However, these decisions were expressly grounded on the availability to the accused of an opportunity to present evidence in mitigation. Thus, in *Williams* v. *Oklahoma, supra,* in upholding the defendant's sentence on the basis of information outside the record of the proceedings, the Court specifically noted (358 U.S. at 583):

> "It is not contended that petitioner requested or suggested that the trial court hear evidence in mitigation of the sentence .... In these circumstances, we cannot say that petitioner was deprived of any right or of fundamental fairness by the fact that the trial court did not pursue the presentencing procedures prescribed by the Oklahoma statutes."

See also *Williams* v. *New York, supra,* 337 U.S. at 244.

In contrast, here an opportunity to present evidence in mitigation to the court was denied petitioner. It is fundamental to criminal justice that an accused be permitted to present evidence and to have an opportunity to persuade the court to accept his position,

regardless of the court's inclination to regard his cause as unmeritorious. Cf. *Douglas* v. *California,* 372 U.S. 353 (1963); *Chessman* v. *Teets,* 354 U.S. 156 (1957).

The case accordingly warrants review by this Court on an important issue of procedure under the Due Process Clause. It presents an appropriate and timely opportunity for the Court to consider the guarantees afforded to defendants under the Fourteenth Amendment in the sentencing stage of a state criminal proceeding.

## CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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October 30, 1964

## APPENDIX A

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### Opinion Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 21170

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B. R. SHEFFIELD, *Appellant*,

versus

ERNEST BROOKS, Sheriff of Hill County, Texas, ET AL., *Appellees.*

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*Appeal from the United States District Court for the Western District of Texas.*

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(August 31, 1964.)

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Before BROWN, MOORE* and GEWIN, Circuit Judges.

MOORE, Circuit Judge: This is an appeal from an order of the United States District Court for the Western District of Texas which denied, after a hearing, a writ of habeas corpus. A certificate of probable cause has been granted. Appellant was convicted after a jury trial in the District Court of Hill County, Texas, for the offense of uttering and passing a forged instrument in writing relating to and affecting title to land. On appeal to the Texas Court of Criminal Appeals, the conviction was affirmed, rehearings were twice denied, and the Supreme Court denied

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* Of the Second Circuit, sitting by designation.

*certiorari*. *Sheffield* v. *State*, 371 S.W. 2d 49 (Tex. Crim. App. 1962), *cert. denied*, 375 U.S. 833 (1963). On a previous appeal, appellant's conviction had been reversed. *Sheffield* v. *State*, 165 Tex. Crim. 354, 307 S.W. 2d 100 (Tex. Crim. App. 1959).

Appellant had been indicted on two counts under Chapter 2 of Title 14 of the Texas Penal Code. The first count charged appellant with forgery in that he aided and abetted and procured the forgery of an acknowledgment of an instrument relating to land by a notary public, Doris Sayles, in violation of Article 1007, Texas Penal Code.[1] This charge was not submitted to the jury. Count two, on which the conviction was obtained, charged that appellant, with intent to defraud, knowingly uttered and passed this forged acknowledgment to the Texas Veterans' Land Board, in violation of Article 1008, Texas Penal Code.[2]

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[1] Article 1007. False certificate by officers.

"If any person authorized by law to take the proof of acknowledgment of any instrument, document or paper whatsoever, affecting or relating to the title of lands in this State, wilfully and falsely certify that such proof or acknowledgment was duly made, or if any person fraudulently affixes a fictitious or pretended signature purporting to be that of an officer or any other person though such person never was an officer or never existed, he shall be deemed guilty of forgery and punished as provided in article 1006 of this chapter."

[2] Article 1008. Knowingly uttering forged instruments.

"Every person who knowingly utters, publishes, passes, or uses, or who in any way aids, assists in or advises the uttering, publishing, passing or using as true and genuine any false, forged, altered, or counterfeited . . . acknowledgment of proof for record or certificate of record belonging to or pertaining to any instrument or paper, or any evidence of any right, title or claim of any character whatsoever . . . in any way relating to, or having any connection with land, or any interest in land in this State, with the intent mentioned in article 1006 of this chapter, or with any other fraudulent intent whatsoever, shall be deemed guilty and be punished in like

In his petition for habeas corpus, appellant claimed a denial of due process, (1) in that the Texas Court of Criminal Appeals affirmed his conviction for uttering and passing by finding him guilty of forging the instrument allegedly uttered and passed, an offense for which he had not been convicted; (2) that the holding of the Texas Court of Criminal Appeals finding him guilty of forging the acknowledgment exposed him to double jeopardy since the forgery count of the indictment had been withdrawn from the jury and, (3) that the Texas trial court refused to hear evidence on his application for adult probation after conviction., We find no merit in these points and, therefore, affirm the denial of the writ.

At the heart of the first two points is appellant's insistence that the Court of Criminal Appeals affirmed his conviction not for uttering and passing but for forgery, a crime of which he had been twice acquitted. Appellant's principal contention on appeal to the Texas court was that the evidence was insufficient to show that the acknowledgment had been "falsely made" or that it had been made with fraudulent intent by Miss Sayles, the notary. The court reviewed the evidence and found that the acknowledgment had been falsely made, but held that Article 1007 "does not require any intent to defraud upon the part of the notary making a false certificate to an acknowledgment. We think the wilful making of a false acknowledgment is *s.* forgery under the terms of the article."

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manner as is provided in article 1006 of this chapter. And the filing or causing or directing to be filed, or causing or directing to be recorded, in the General Land Office of the State, or in any office of record or in any court in this State, or the sending through the mails of by express, or in any other way, for the purpose of filing of record of any such false, altered, forged or counterfeited matter, documents, conveyances, papers, or things, knowing the same to be false, altered, forged or counterfeited, shall be an uttering, publishing and using within the meaning of this article."

371 S.W. 2d at 52. On appellant's motion for rehearing, it was again argued that the evidence was insufficient to show that the notary had any fraudulent intent. However, the court responded:

> "In addition to the disposition made of this contention in the original opinion, it is further concluded that without regard to whether Doris Sayles innocently, or while acting as a principal, certified that Mireles appeared before her as a Notary, the evidence is sufficient to warrant the finding that the appellant had the intent to defraud and was a principal in the Commission of the offense charged."

While the last quoted language is not altogether free of difficulty, we do not agree that it warrants the conclusion that the court was affirming on a finding that appellant was guilty of forgery. In its opinion on rehearing, the Texas Court did not alter the explicit holding of the original decision that Article 1007 does not require an intent to defraud and that Doris Sayles was guilty of wilfully and falsely forging the acknowledgment in question. Since we hold that appellant's conviction for passing and uttering was properly affirmed, we need not reach his claim of double jeopardy.

After the jury imposed sentence upon appellant, he filed an application with the trial court for probation and suspension of sentence pursuant to Article 781d of the Texas Code of Criminal Procedure. The Trial Judge "considered said application and the argument of counsel." The lengthy application reviewed in detail the pre-trial negotiations between the State's Attorney and defense attorney wherein appellant had sought unsuccessfully to enter a plea of nolo contendere in exchange for the State's Attorney's recommendation of probation and a fine. The application also averred, among other things, that appellant was in poor health, enjoyed a splendid reputation as a law-abiding citizen, had never been convicted of a

felony before, was a self-employed family man and that he would not be a burden upon the public if he were granted probation. The trial judge, however, refused to hear evidence in support of the allegations in this application, reasoning "that it was not an abuse of judicial discretion to refuse to consider probation or any other additional evidence or testimony thereon, having heard all the testimony [adduced at trial] . . ." As appellant recognizes, the granting or denial of probation in Texas is entirely discretionary. See, *e.g.*, *Ray* v. *State*, 319 S.W. 2d 705 (Tex. Crim. App. 1958). His argument on this point does not raise a substantial federal question.

Affirmed. Bail heretofore granted pending appeal shall automatically terminate on the effective date of our order, issued pursuant to this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 21170

D. C. Docket No. 2367—Civil

B. R. SHEFFIELD, *Appellant*,

v.

ERNEST BROOKS, Sheriff of Hill County, TEXAS, ET AL., *Appellees*.

Appeal from the United States District Court
for the Western District of Texas.

Before BROWN, MOORE* and GEWIN, Circuit Judges.

**Judgment**

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby affirmed; and that bail heretofore granted pending appeal shall automatically terminate on the effective date of this judgment, issued pursuant to the opinion of this Court;

August 31, 1964

Issued as Mandate:

* Of the Second Circuit, sitting by designation.

**Opinion of the Court of Appeals for the Fifth Circuit Upon Rehearing**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 21170

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B. R. SHEFFIELD, *Appellant,*

v.

ERNEST BROOKS, Sheriff of Hill County, Texas, ET AL., *Appellees.*

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Appeal from the United States District Court for the Western District of Texas.

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(October 6, 1964)

ON PETITION FOR REHEARING

Before BROWN, MOORE* and GEWIN, Circuit Judges.

PER CURIAM:

It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED, but the Order of Judge Brown of December 13, 1963, allowing bail pending appeal is continued in effect for thirty days pending the filing of a petition for certiorari with the United States Supreme Court on or before such time and to continue thereafter until the final Order of the Supreme Court therein.

Petition for Rehearing filed: 9/17/64

Petition for Rehearing denied: 10/ 6/64

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* Of the Second Circuit, sitting by designation.

**Opinion of the District Court**

Civil Action No. 2367

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS,
WACO DIVISION

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B. R. SHEFFIELD, *Petitioner*

versus

ERNEST BROOKS, Sheriff of Hill County, ET AL.,
*Respondents*

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under the provisions of Rule 52, of the Rules of Civil Procedure, this civil cause having been tried by the Court without a jury, I make the following separate Findings of Fact and Conclusions of Law, to wit:

FINDINGS OF FACT

1. I find from the record that petitioner, B. R. Sheffield has duly presented the questions contained in his Application for Habeas Corpus in the original appeal before the Court of Criminal Appeals of Texas, and by Certiorari in the Supreme Court, which was denied, and has exhausted his remedies in the State courts.

2. I find that there is no substantial federal question presented by the Petition for Habeas Corpus in this case.

CONCLUSIONS OF LAW

1. I conclude as a matter of law that the petitioner has no additional remedy in the State Courts.

2. I conclude as a matter of law that the Petition for Habeas Corpus should be denied; and petitioner be remanded to the custody of the respondents.

3. I decline as a matter of law to certify probable cause under 28 U.S.C. 2253.

Done at San Antonio this 13th day of December, A.D. 1963.

RICE, *Judge*

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**Opinion of the Texas Court of Criminal Appeals in This Case**

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

OPINION

Appellant was convicted of the offense of uttering and passing a forged instrument in writing relating to and affecting title to land. His punishment was assessed at confinement in the penitentiary for a term of six years.

Trial was had in the District Court of Hill County, Texas, after a change of venue from the District Court of Travis County, Texas. The cause was heretofore reversed by this court in Sheffield v. State, 307 S.W. 2d 100, because the evidence was insufficient to show that the notary public taking the acknowledgment to the instrument alleged to be false was a duly qualified notary public, and for other reasons set forth in the opinion.

The statutes, Arts. 1006, 1007, and 1008 of the Penal Code, under which appellant was convicted, were held constitutional in the opinion.

Attention being directed to the amendment of Art. 5412m, V.A.C.S., in 1955, by the addition of Sec. 32 prescribing a

penalty for the use of any false, fictitious, or forged instrument in writing in connection with or pertaining to any transaction under the Veterans Land Fund Act, the court gave application to the penalty prescribed in said section, the section being enacted by the legislature subsequent to the date of the offense charged against appellant and prescribing a lesser penalty than that prescribed in Art. 1006, supra.

We find no merit in appellant's contention that in enacting Sec. 32 of Art. 5421m, supra, the legislature repealed Art. 1008, supra. A contrary intention was clearly expressed in Sec. 14 of the later act wherein it was provided that the provisions of the act were to be cumulative of all other laws not in conflict therewith.

The record in this case is perhaps one of the longest with which this court has been confronted. It contains some 3,800 pages. After carefully reviewing the entire record, we find that appellant's primary contention is that the evidence is insufficient to support the conviction. It is his contention that the evidence fails to show that the acknowledgment, as set out in the indictment, was "falsely made" by the notary, Doris Sayles, or that it was made with any fraudulent intent.

Briefly summarizing the testimony, it reflects that the appellant had been engaged in what is known as "block deals" under the Veterans Land Program of this state at Brady, Texas. Appellant and L. V. Ruffin secured applications from qualified veterans, paid them $100 each for the rights under the Veterans Land Program, submitted the application to the Veterans Land Office at Austin, Texas, purchasing the land on the sworn application of these various veterans without the veterans appearing before a notary public to swear to the applications pertaining to the acquisition of the land. The conviction in this cause was had on the transaction involving a veteran by the name of Alfonso G. Mireles. Mireles was a veteran living at Brady,

Texas. He went to the office of L. V. Ruffin and signed an application. He testified that he did not read it, that he did not appear before Doris Sayles, that he never talked to her, that he did not want to buy any land, that he had never been in Kinney County, Texas, where the land involved in this transaction is located, that some nine months later he signed some papers for Mr. Ruffin, that Ruffin gave him a check for $100, that the final contract was acknowledged by Jerrie Rankin but he did not appear before Jerrie Rankin and did not know her.

The testimony of Doris Sayles, substantiated by a copy of the commission from the Secretary of State, adequately reflects that she was a notary public. She testified that Mireles did not appear before her but the acklowledgment reflects that she certified that he did.

The evidence adduced from the testimony of Doris Sayles and Mireles clearly shows that the acknowledgment was falsely made.

Art. 1007, V.A.P.C., which was the applicable statute at the time of the commission of the offense, provides that if any person authorized by law to take the proof of an acknowledgment to any instrument, document, or paper whatsoever, affecting or relating to the title of lands in this state, wilfully and falsely certifies to such proof or acknowledgment duly made, he shall be guilty of forgery. We hold that this article does not require any intent to defraud upon the part of the notary making a false certificate to an acknowledgment. We think the wiliful making of a false acknowledgment is a forgery under the terms of the article. Appellant's contention is without merit.

Appellant further contends that the facts and circumstances are not sufficient to show that he was a principal and that there is no evidence that he uttered personally, published, passed, or used the alleged false or forged acknowledgment.

We think it unnecessary to here review the lengthy testimony as to the scheme or system used by appellant, Ruffin, and Bascom Giles in this and other transactions involving the purchase of large blocks or tracts of land and the division of the excess profits from the inflated values with intent to defraud. Suffice it to say that the testimony is more than adequate to establish the appellant as a principal in this transaction. Ruffin's testimony shows that appellant knew the applications of the various veterans were in blank. Ruffin testified that he secured more than 100 veterans' signatures to applications, approximately 54 of them being used in this transaction, and that the Rosenow Ranch involved in this transaction was in Kinney County, and Mireles was to get his tract of land out of it. Ruffin's testimony further reflects that appellant suggested that they make different tracts so that it would look better; that appellant got the money from Brady National Bank; that appellant was to pay Ruffin some $20,000 but that appellant said he had to pay Giles $75,000 and that he reduced the amount that Ruffin was to receive.

Appellant testified that Ruffin laid the papers involving the Rosenow Ranch on his desk and talked to appellant's wife and said he wanted Doris to do some work for him; that Doris came in and asked where the papers were and appellant pointed them out to her; that he did not take the applications to Austin; that he did not know the law required the person making the acknowledgment to be present; and that such was not the practice in Brady, Texas.

The testimony of Doris Sayles, who was Mrs. Grover C. Cunningham at the time of this trial, reflects that appellant asked her to come to his office on many occasions in reference to notarizing the applications of veterans and that none of the veterans were ever before her when the acknowledgments were completed. She further testified that when she read of the investigations of the Veterans Land scandals and talked to the appellant that he informed her he would tell them he was responsible.

Appellant's testimony shows that he borrowed the money to make the down payments for the 34 veterans on the Rosenow tract; and that he had quite a few dealings with Bascom Giles, who was the Commissioner of the General Land Office and also shown to be the Chairman of the Veterans Land Board in the State of Texas.

The state's testimony amply reflects many telephone calls from Brady made by the appellant and Ruffin to Giles at Austin and, in turn, numerous calls were made by Giles to appellant at Brady during the time of this and other transactions. The testimony of the state further reflects that the 10,000-acre Rosenow Ranch was purchased by appellant and others for $16 per acre; that the appraiser for the Veterans Land Board first appraised the land at $27 per acre and was later instructed by Bascom Giles to add $5 per acre to the valuation. The state's exhibits show receipts issued to appellant for fifty-four cashier's checks to the Veterans Land Board for the 5% down payment on each loan, plus the fifty-four receipts for cashier's checks for the $50 closing fee on each tract. The state further showed that appellant assigned fifty-one commitments made by the Veterans Land Board to veterans for the land subdivided in the Rosenow Ranch tract to Bankers Life & Casualty Company of Chicago.

While the evidence of Doris Sayles Cunningham and L. V. Ruffin is accomplice testimony, it directly shows that appellant was a principal in this and other transactions. We conclude that the testimony of Mrs. Jerrie Rankin, in addition to the other testimony, is sufficient to corroborate the testimony of these two accomplice witnesses. Cawley v. State, 310 S. W. 2d 340 .

The question as to Mireles being an accomplice was submitted to the jury. We do not think the proof shows that he was an accomplice. In our opinion, he was an innocent veteran with little education, looking for an easy one-hundred-dollar pick up. We held the evidence sufficient to show

appellant to have been a principal throughout the transaction involved. It is unnecessary to corrobrate the entire narrative and all of the testimony of an accomplice. Middleton v. State, 217 S. W. 1046. Every constituent element of the offense as testified to by the accomplice need not be corroborated. Williams v. State, 128 S. W. 1120; Shaffer v. State. 52 S. W. 2d 1054. Also see: Contreras v. State, 162 S. W. 2d 716, which holds that it is not necessary that the corroborating evidence support that of the accomplice to each criminative fact but is sufficient if the corroborating evidence tends to connect the accused with the offense charged.

Appellant strenuously urges by lengthy brief and oral argument that the trial court erred in overruling his objections to the court's charge. The record before us reflects that the trial court filed its first charge at 1:55 p.m., on February 6, 1961, and that the appellant took exceptions and objections to it, embodying some forty-two pages. The court then filed another charge at 9:45 p.m., on February 7, 1961. From this state of the record, it is not entirely clear to us that the appellant excepted and objected to his second or last charge of the court, which was the one read to the jury. We do resolve any doubt in this connection in appellant's favor and adopt his premise that he also made exceptions and objections to the final charge of the court. We do not find, however, that the appellant took exception to the ruling of the court in overruling his exceptions and objections to this charge of the court. In the absence of such exception, appellant's complaint to the charge is not before us for review. Stone v. State, 346 S. W. 2d 323; Eldredge v. State, 284 S. W. 2d 734; Smith v. State, 313 S. W. 2d 291; Redman v. State, 287 S. W. 2d 676; Medlock v. State, 356 S. W. 2d 312. For like reasons, the complaints to the refusal of requested charges are not before us. Medlock v. State, supra, and cases cited.

Appellant next complains that the trial court erred in overruling his motion to quash the indictment. We think

this contention is without merit. The indictment in the second count alleged, in substance, that appellant did unlawfully and with the intent to make money and with the intent to defraud, knowingly utter, publish, pass, and use as true and genuine, to the Veterans Land Board of the State of Texas, a certain false and forged acknowledgment to a certain instrument in writing relating to and affecting title to land, and that when the appellant did utter, publish, pass, and use as true and genuine the said instrument in writing, he well knew that said acknowledgment was false and forged.

The failure to allege how and by whom the acknowledgment was falsely made did not render the indictment insufficient. Updack v. State, 96 S. W. 2d 979.

Appellant fourthly complains of the action of the trial court in overruling his motion to change venue from Hill County because of local prejudice against him. No affidavits of compurgators in support of the change of venue were filed. A motion for change of venue must be supported by affidavits of at least two compurgators in order to be considered. Philpot v. State, 332 S. W. 2d 323; McGowen v. State, 290 S. W. 2d 521, 77 S. Ct. 1405, 354 U. S. 936; Windham v. State, 288 S. W. 2d 90. This complaint is also without merit.

Appellant's contention that the second count of the indictment shows that it was barred by the three-year statute of limitation is without merit. The record shows that the offense was alleged to have been committed on or about the 20th day of May, 1954, and the indictment was returned June 11, 1959. Art. 177, C.C.P., fixes the limitation period for this offense at ten years. By the holding of this court in the first Sheffield case, 307 S. W. 2d 100, the offense here charged is within the forgery offense, and the ten-year statute applies to forgery. The same is true of the offense defined in Art. 5421m, Sec. 32, supra. So the offense is not barred.

Lastly, the appellant complains of the action of the trial court in overruling his application for probation. No error is shown. Probation is discretionary with the trial court. McClane v. State, 343 S. W. 2d 447.

We have carefully considered and examined all of the remaining contentions of appellant, along with the numerous informal bills of exception, and find no error reflected in any of them.

Finding the evidence sufficient to sustain the verdict of the jury and finding no reversible error, the judgment is affirmed.

McDONALD, *Judge*

(Delivered October 3, 1962)

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**Opinion of the Court of Criminal Appeals of Texas in This Case Upon Rehearing**

No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

OPINION ON APPELLANT'S MOTION FOR REHEARING

Appellant contends that the contract of sale and the assignment which is set out and referred to in the indictment as "a certain instrument in writing" relate to the sale of real estate, and are in violation of the provisions of Art. 1137 h, V.A.P.C. This statute prohibits any person subdividing real estate from using the subdivision's description in any deed of conveyance or contract of sale delivered to a purchaser unless and until a map or plat has been duly authorized and filed for record with the clerk of the County Court of the county where the real

estate is situated. He further contends that the statutory prohibition with a penalty imposed renders the contract of sale and the assignment void. Therefore, the assignment on which this prosecution rests could not be made the basis of forgery and the appellant could not be guilty as charged.

At first attention is directed to the provisions of Art. 1010, V.A.P.C., to the effect that upon indictment under Chapter 2 of Title 14, it shall be no defense that the instrument was in law, either as to substance or form, void.

The first paragraph in the contract of sale consists of an application to purchase real estate from the Veterans Land Board of Texas. The contract is subject, among other conditions, to the commitment of the Board not being below the contract price. Next, the contract is subject to the defects, if any, in the title. The assignment depends on certain terms and conditions, and is also subject to acceptance by the Board.

It is apparent from the contract that it is an executory contract to convey and not such a contract of sale per se as passes either legal or equitable title. The assignment is in the same condition. Currie v. Burgess, 120 S. W. 2d 788; Tashneck v. Hefner, 282 S. W. 2d 298. Art. 1137 h, supra, relates only to deeds and contracts of sale delivered to a purchaser. Therefore, the assignment set out and designated in the indictment as "a certain instrument in writing" is not void because it does not come within the terms of the aforesaid article.

It is insisted that there is a fatal variance between the allegations of the indictment and the proof because the description of the real estate is violative of Art. 1137 h, supra, which renders the contract of sale and its assignment void. This contention is controlled by the holding herein that said article is not applicable to the instruments here in question.

It is strenuously re-urged that the evidence is insufficient to support the conviction on the ground that there is no showing that Doris Sayles, the notary, had any fraudulent intent when she certified that Mireles had appeared before her in the making of the acknowledgment.

In addition to the disposition made of this contention in the original opinion, it is further concluded that without regard to whether Doris Sayles innocently, or while acting as a principal, certified that Mireles appeared before her as a notary, the evidence is sufficient to warrant the finding that the appellant had the intent to defraud and was a principal in the commission of the offense charged.

The motion for rehearing is overruled.

BELCHER, *Judge.*

(Delivered January 9, 1963.)

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No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

**Concurring Opinion on Motion for Rehearing**

Appellant's counsel has tendered to this Court as an exhibit to his motion for rehearing a stipulation executed by all the prosecutors involved and joined in by himself in which it is ageed that he did in fact except to the action of the court in overruling his objections and exceptions to the charge and that such exception was, through inadvertence and oversight, omitted from the certificate of the court.

There is no escape from the conclusion that if we considered such stipulation we would in effect be permitting

an amendment to a bill of exception long after the statutory time for filing the same has expired and would be overruling a long line of authorities which hold that such may not be done.

In the recent case of Gonzales v. State, 297 S. W. 2d 144, we held that the district clerk was without power to antedate or attempt to file back objections and exceptions to the court's charge. Therein, we cite Ortiz v. State, 53 S. W. 2d 58, as authority for the rule that this might not be done even with the consent of the trial court. The effect of such holding is that a bill of exception must be perfected under Article 760d, V.A.C.C.P., within 90 days after the giving of notice of appeal and that once that time has elapsed no bills filed or perfected thereafter will be considered.

In Tindol v. State, 239 S. W. 2d 396, we said:

> "In this connection attention is directed to the rule that a bill of exception becomes an unamendable instrument once the appeal is perfected and the time for filing such bills has expired, because the trial court is then without jurisdiction to make any order whatsoever in the case. For this Court to allow the filing of amendments or additions to bills in cases on appeal would so complicate and delay the adjudication of a cause of action that this Court might never remain current with its docket. This we must do in order to properly perform our function in the judicial system."

See also Crawford v. State, 305 S. W. 2d 362, and Smith v. State, 313 S. W. 2d 291, and cases there cited.

I join in the overruling of the motion for rehearing

MORRISON, *Judge.*

(Delivered January 9, 1963)

**Minutes of Court of Criminal Appeals**

AUSTIN, TEXAS

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

SECOND MOTION FOR REHEARING OVERRULED WITHOUT WRITTEN OPINION

February 13, 1963

This cause came on to be heard on Appellant's Second Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that the said motion be and the same is hereby in all things overruled.

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## APPENDIX B

### Statutes

**Title 14, Chap. 2, Articles 1006, 1007, 1008, 1010, and 1011, Texas Penal Code 1925:**

Article 1006. *Forgery of patents, etc.*

Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or in any way aids, assists, advises, or encourages the false making, altering, forging, or counterfeiting of any . . . transfer, assignment, release, conveyance, or title paper, or acknowledgment, or proof of record, . . . in relation to or affecting lands, or any interest in lands in this State, with the intent to make money or other valuable thing thereby . . . or with any fraudulent intent whatever, shall be deemed guilty of forgery and be punished by imprisonment in the State penitentiary at hard labor not less than five nor more than twenty years.

Article 1007. *False certificate by officers*

If any person authorized by law to take the proof of acknowledgment of any instrument, document or paper whatsoever, affecting or relating to the title of lands in this State, wilfully and falsely certify that such proof or acknowledgment was duly made, or if any person fraudulently affixes a fictitious or pretended signature purporting to be that of an officer or any other person, though such person never was an officer or never existed, he shall be deemed guilty of forgery and punished as provided in article 1006 of this chapter.

Article 1008. *Knowingly uttering forged instruments*

Every person who knowingly utters, publishes, passes, or uses, or who in any way aids, assists in or advises the uttering, publishing, passing or using as true and genuine any false, forged, altered, or counterfeited . . . acknowledgment or proof for record or certificate of record belonging to or pertaining to any instrument or paper, or any evidence of any right, title or claim of any character whatsoever . . . in any way relating to, or having any connection with land, or any interest in land in this State, with the intent mentioned in article 1006 of this chapter, or with any other fraudulent intent whatsoever, shall be deemed guilty and be punished in like manner as is provided in article 1006 of this chapter. And the filing or causing or directing to be filed, or causing or directing to be recorded, in the General Land Office of the State, or in any office of record or in any court in this State, or the sending through the mails or by express, or in any other way, for the purpose of filing of record of any such false, altered, forged or counterfeited matter, documents, conveyances, papers, or things, knowing the same to be false, altered, forged or counterfeited, shall be an uttering, publishing and using within the meaning of this article.

### Article 1010. *Proof and allegations*

Upon indictment under this chapter, to warrant a conviction, it shall only be necessary to prove that the person charged took any one step, or did any one act or thing in the commission of the offense, if from such step, act or thing any of the intentions hereinbefore mentioned, or any other fraudulent intention, may be reasonably inferred; nor shall it be any defense to a prosecution under this chapter that the matter, act, deed, instrument or thing was in law, either as to substance or form, void, or that the same was not in fact used for the purpose for which it was made or designed; and it shall only be necessary in an indictment under this chapter to state with reasonable certainty the act constituting the offense, and charge, in connection therewith, in general terms, the intention to defraud, without naming the person or persons it was intended to defraud. On trial of such indictment, it shall be sufficient and shall not be deemed a variance if there appears to be an intent to defraud the United States, or any State, Territory, county, city, town or village, or any body corporate, or any public officer in his official capacity, or any co-partnership, or member thereof, or any particular person.

### Article 1011. *Rules in forgery applicable*

The rules prescribed in the preceding chapter relative to the offense of forgery, so far as the same are applicable, shall apply to the various offenses enumerated in this chapter.

**Texas Code of Criminal Procedure, Article 781d, Article II:**

Article II. *Probations*

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Sec. 3. The courts of the State of Texas having original jurisdiction of felony criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any felony, crime or offense except murder, rape, and offenses against morals, decency, and chastity, where the maximum punishment assessed the defendant does not exceed ten years imprisonment, and where the defendant has not been previously convicted of a felony, to suspend the imposition or the execution of sentence and may place the defendant on probation for the maximum period of the sentence imposed or, if no sentence has been imposed, for the maximum period for which the defendant might have been sentenced, or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. Any such person placed on probation shall be under the supervision of such court.

* * * * *

**Constitution of Texas, Article 1, § 14. Double Jeopardy:**

Sec. 14. No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.